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No. 90-365

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SHAHSULTAN JAFFER,

Petitioner,

VS.

GILBERT GRANET, et al., JUDGE MARVIN ASPEN, ROBERT F. KLIMEK, et al. and JUDGE NICHOLAS BUA,

Respondents.

OPPOSITION TO PETITION ON WRIT OF PROHIBITION AND MANDAMUS

BRIEF FOR THE RESPONDENTS ROBERT F. KLIMEK, ROBERT L. RICHIARDI, KLIMEK & RICHIARDI LTD., MORTON L. HUFF, WARREN G. FOX, AND MAXITRON & CO. AS SUCCESSOR TO MAXITRON CORPORATION and R.P.N. ACQUISITION CORP.

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QUESTIONS PRESENTED

Whether this court has jurisdiction under 28 U.S.C. §1361 and/or 28 U.S.C. §1651 where petitioner has failed to perfect her appeals?

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not officially reported and is reproduced in the Appendix, infra, page 20.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 30, 1990. Petitioner's application on writ of prohibition and mandamus was apparently

first filed on April 19, 1990. The Jurisdiction of this Court, if it exists, rests on 28 U.S.C. §§1361 and 1651.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutory provisions and regulations are set forth in the Appendix, infra, page 19.

STATEMENT

Shahsultan Jaffer ("Jaffer" or "petitioner") was a 5% shareholder of Maxitron Corporation ("Maxitron")[1/]. In April 1986, Jaffer commenced a pro se stockholders' derivative action entitled Shahsultan Jaffer, individually and on behalf of Maxitron Corporation and S.S.I. Investors, Limited v. Gilbert K. Granet, et al.,[2/] 86 Civ. 6014 (Judge Marvin Aspen) ("Jaffer I")[3/]. In

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[1/] Maxitron & Co., as successor to Maxitron, owns a majority of shares of PIE Nationwide, Inc.

[2/] The other defendants in Jaffer I were Christopher Jansen, Robert F. Klimek, Morton Huff, Robert L. Richiardi, David E. Babcock, Charles H. Bentzel, Maxitron Corp., Klimek & Richiardi, Ltd. and WSI Investors, Inc.

[3/] This action was originally commenced in the United States District Court for the Southern District of New York, and transferred on motion to the District of Illinois.

addition to suing derivatively in the right of Maxitron, Jaffer sued Maxitron directly for S.S.I. Investors, Ltd., a corporation in which Jaffer was also apparently a shareholder. Over the course of 2-1/2 years, Jaffer I was dismissed twice by the Court for failure to prosecute and on October 7, 1988, Jaffer's motion for leave to file a pro se appearance was denied by order of United States Magistrate W. Thomas Rosemond, Jr. dated October 7, 1988. The order of dismissal was subsequently sustained by Judge Aspen.

While Jaffer I was pending, on or about February 6, 1987, Jaffer commenced another action encaptioned Shahsultan Jaffer v. Robert F. Klimek,

et al., 86 Civ. 1122 (Judge Nicholas Bua) in the United States District Court for the Northern District of Illinois ("Jaffer II")[4/] alleging violation of Section 10(b) of the Securities and Exchange Act of 1934, Section 78(j), Rule 10b(5), Title 9 of the Organized Crime Act of 1970, the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 28 U.S.C. §1961 et seq., provisions of the Illinois Business Corporations Act and Illinois common law. Jaffer II was based on many of the same facts as Jaffer I.

Jaffer II was dismissed twice by the Court for failure to prosecute

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4/ The other defendants in Jaffer II were Robert L. Richiardi, Morton L. Huff, Peter A. Wasem, Warren G. Fox, Klimek & Richiardi, Ltd., R.P.N. Acquisition Corp., Maxitron & Co., and Maxitron Corporation.

and once again, Jaffer sought leave to file a pro se appearance. By order of United States Magistrate Joan Humphrey Lefkow dated September 30, 1988, Jaffer's motion for leave to file a pro se appearance and to reinstate her case was denied. By order of the Honorable Nicholas Bua dated October 19, 1988, Jaffer II was dismissed. Jaffer appealed in both cases[5/] and perfected her appeal in neither. Both actions, consolidated for appeal, were dismissed for failure to prosecute by order of the Court of Appeals for the Seventh Circuit dated August 30, 1990. See Appendix, infra, page 20.

Jaffer comes to this court ostensibly seeking a writ of prohibition

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5/ The appeals were consolidated as 88-3223 and 88-3224.

to the United States Court of Appeals for the Seventh Circuit prohibiting it from any further proceedings with respect to the consolidated appeals until a grand jury investigation can be had, and a writ of mandamus compelling the Attorney General to commence a grand jury investigation into the alleged criminal wrongdoing in the courts of the United States.

SUMMARY OF ARGUMENT

Petitioner comes to this Court seeking issuance of the extraordinary writs of prohibition against the Court of Appeals for the Seventh Circuit and mandamus to compel the Attorney General to commence a grand jury investigation into the alleged criminal wrongdoing in the courts of the United States. First,

this Court ought not accept jurisdiction of this action because petitioner failed to exhaust available remedies below. Second, whereas petitioner's appeals were dismissed by the Court of Appeals for failure to prosecute, and whereas this Court denied petitioner's application to stay lower court proceedings on June 28, 1990, petitioner's application for a writ of prohibition is moot, in addition to being improvidently sought.

Similarly, petitioner's application for a writ of mandamus is improvidently sought and should be denied because there is no basis in law for the relief requested.

ARGUMENT

POINT I

THE EXTRAORDINARY WRITS OF PROHIBITION AND MANDAMUS SHOULD NOT ISSUE WHERE PETITIONER HAS FAILED TO EXERCISE HER RIGHT OF APPEAL

A. Mandamus Will Not Lie To Compel Officials to Initiate Prosecutions

The Mandamus and Venue Act provides that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States to perform a duty owed to the plaintiff." 28 U.S.C. §1361.

> Historically, mandamus is an extraordinary remedial process awarded only in the exercise of sound judicial discretion. Before such a writ may issue, it must appear that the claim is clear and certain and the duty of the officer involved must be ministerial, plainly defined, and peremptory

> [citation omitted]. The duty sought to be exercised must be a positive command, and so plainly prescribed as to be free from doubt. Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 50 S.Ct. 320, 74 L.Ed. 809. Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364, 367 (10th Cir.), cert. denied, 87 S.Ct. 70, 385 U.S. 31 (1966). Because mandamus is an extraordinary remedy, it is a 'settled rule that the writ of mandamus may not be employed to secure the adjudication of a disputed right for which an ordinary suit affords a remedy equally adequate and complete.'

Vishnevsky v. United States, 581 F.2d 1249, 1254 (7th Cir. 1978). This limitation reflects the congressional policy that the judiciary should not interfere with the valid exercise of a delegated power, and that a writ of mandamus should not issue where its effect is to influence the exercise of discretion of an officer or employee of the United States. See, e.g., Smith v. United States, 333 F.2d 70, 72 (10th

Cir. 1964); Hourigan v. Carter, 478 F. Supp. 16 (D. Ill. 1979) (mandamus will not lie to compel attorney general to initiate prosecutions); Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364, (10th Cir.) cert. denied 87 S.Ct. 70, 385 U.S. 831 (1966) (where Congress stated that appropriated monies could be used for any purpose authorized by the tribal government and approved by the Secretary of the Interior, the actions of the Secretary of the Interior were discretionary, not ministerial and mandamus was inappropriate); Heckler v. Ringer, 104 S.Ct. 2013, 466 U.S. 602 (1984) (decision of Secretary of Health & Human Services as to whether a particular medical service is reasonable and necessary and thús eligible for reimbursement under medicare are

discretionary decisions, not subject to mandamus).

On the present facts, Jaffer has not established that initiation of a prosecution by the attorney general is a peremptory, ministerial and non-discretionary duty. Neither has Jaffer presented any authority that mandamus is appropriate to compel criminal prosecution. The weight of authority is to the contrary.

In Hourigan v. Carter, 478 F. Supp. 16, 17 (D. Ill. 1979), plaintiff brought an action against the President of the United States, the Secretary of Energy and the Attorney General to compel them to initiate prosecutions against certain oil distributors and suppliers who were alleged to have violated laws and regulations regarding the pricing of crude oil.

The Court stated:

> The prosecutor's possession of strong evidence does not in and of itself impose a duty to prosecute that can be enforced by mandamus.
>
> It is not blind obedience to precedent that leads this court to follow the rule that mandamus will lie only to compel ministerial acts, although the precedent is clear enough. See, e.g., Inmates v. Rockefeller, 477 F.2d 375 (2d Cir. 1973); Peek v. Mitchell, 419 F.2d 575 (6th Cir. 1970); Powell v. Katzenbach, 123 U.S.App.D.C. 250, 359 F.2d 234 (D.C. Cir. 1965), cert. denied, 384 U.S. 906, 86 S.Ct. 1341, 16 L.Ed.2d 359 (1966); Fleetwood v. Thompson, 358 F. Supp. 310 (N.D. Ill. 1972). Rather, it is adherence to fundamental concepts of due process and separation of powers that compel the courts to refrain from deciding what cases should be brought before them.

Hourigan v. Carter, 478 F. Supp. at 17. Accordingly, like the plaintiff in Hourigan v. Carter, supra, Jaffer has failed to demonstrate that mandamus is appropriate in these circumstances.

B. Petitioner's Request For The Issuance Of A Writ Of Prohibition Appears To Be Moot And In Any Event Prohibition Is Not A Substitute For Appeal.

Similarly, it is well established that "prohibition and injunction against judges are drastic and extraordinary remedies ... reserved for really extraordinary causes." Ex Parte Fahey, 332 U.S. 258, 67 S.Ct. 1558, 1559 (1947).

In Gottlieb v. Rubenstein, 252 F.2d 779 (6th Cir. 1958) the Court of Appeals for the Sixth Circuit stated:

> While this Court has authority in a mandamus proceeding to require a District Judge to make a ruling in a cause pending before him, we will not undertake by mandamus to direct him what ruling to make, particularly where the ruling is one which addresses itself to the discretion of the District Judge. Ex parte Park & Tilford, 245 U.S. 82, 85, 38 S.Ct. 15, 62 L.Ed. 164; Jewell

v. Davies, 6 Cir., 192 F.2d 670, 673.

The Court is of the opinion that the Writ of Mandamus is not to be used as a substitute for an appeal and that the circumstances in this case are not so exceptional as to justify a departure from the rule.[6/] Massey-Harris-Ferguson, Ltd. v. Boyd, 6 Cir., 242 F.2d 800, certiorari denied 355 U.S. 806, 78 S.Ct. 48, 2 L.Ed.2d 50; Walker v. Brooks, 6 Cir. 251 F.2d 555. See: United States ex rel. Kennedy v. Tyler, 269 U.S. 13, 19, 46 S.Ct. 1, 70 L.Ed. 138. [footnote by respondents]

6/ In Gottlieb v. Rubenstein, 252 F.2d 779 (6th Cir. 1958) the petitioner obtained a verdict for $12,500 by reason of injuries to her minor son. When the defendant moved for a new trial on the ground that the verdict was excessive, the district judge entered an order granting a new trial unless petitioner would remit $2,500. The petitioner sought a writ of mandamus on the grounds that the district judge abused his discretion in failing to follow settled law on the issue of damages, and improperly invaded the function of the jury. Petitioner claimed to be a widow with limited means and without adequate remedy by appeal.

Gottlieb v. Rubenstein, 252 F.2d 779, 780 (6th Cir. 1958). See also People ex rel. Tinkoff v. Campbell, 212 F.2d 785 (7th Cir. 1954) (writ of mandamus is not the appropriate remedy to compel a district judge to disqualify himself for alleged personal bias).

In Jaffer's case, she has simply failed to prosecute her cases or her appeals in an orderly or appropriate fashion. In addition, at this juncture, since this Court denied petitioner's application to stay lower court proceedings on June 28, 1990, and the Court of Appeals dismissed the consolidated appeals for failure to prosecute by order dated August 30, 1990, petitioner's request for issuance of a writ of prohibition appears to be moot. But even if petitioner's request is not moot, prohibition is

improvidently sought by her. The voluminous court files demonstrate that neither the District Court nor the Court of Appeals has failed to acknowledge jurisdiction of either Jaffer I or Jaffer II. Nor has either court failed to adjudicate issues properly brought before it during the past 3 1/2 years that Jaffer has unconscionably dragged respondents through the courts, apparently seeking to wear them down and to fritter away their resources in order to satisfy some personal vendetta. Jaffer, herself staunchly refuses to accept well-settled, applicable law, that non-lawyers may not represent corporations and may not bring actions pro se in representative capacities -- both steps Jaffer wanted to take in the District Court below.

While respondents certainly appreciate that wide latitude is given to pro se litigants, given limited resources and understanding of the processes of the law, even this latitude has its limits. Jaffer's seemingly endless series of wholly meritless motions in the District Court, Court of Appeals and now this Court has unfairly exacted enormous expense from respondents.

In addition, Jaffer has refused at every turn to properly prosecute either action or appeal by failing to retain counsel on a continuing basis, appear in court for conferences and file appropriate papers relative to the litigation only to proffer excuse after excuse as to why she had not appeared when commanded, not retained counsel or filed appropriate documents, and

ultimately, why she cannot be held accountable for her actions. After each episode, Jaffer is heard to repeatedly complain that her rights are being violated by a multitude of entities including respondents, the judiciary and the Attorney General.

CONCLUSION

For the reasons set forth above, respondents respectfully urge the Court to deny the relief requested by the petitioner in its entirety, and to award just damages and double costs to the appearing respondents.

Respectfully submitted,

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September 28, 1990

APPENDIX

§1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

§1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of court which has jurisdiction.

United States District
Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

August 30, 1990

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTENBROOK,
Circuit Judge

SHAHSULTAN JAFFER, Plaintiff-Appellant	(Appeals from the (United States (District Court (for the Northern
Nos. 88-3223 and 88-3224 v	(District of (Illinois, Eastern (Division:
GILBERT K. GRANET, et al., Defendants-Appellees	(No. 86 C 6014 (Judge Marvin E. (Aspen (

Ms. Jaffer has persistently refused to obey the court's orders directing her to file her opening consolidted brief in these long pending consolidated appeals. She has been repeatedly warned that her continued refusal to file a brief would result in the dismissal of her appeals pursuant to Circuit Rule 31(c)(2). The fact that she is seeking some form of relief in the United States Supreme Court does not relieve her of her obligation to this court to prosecute her appeals. Under the circumstances,

IT IS NOW ORDERED that these appeals are hereby DISMISSED for want of prosecution under Circuit Rule 31(c)(2).